United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1020

To be argued by:
George A. Davidson

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. OSCAR LEE CHENNAULT,

Petitioner-Appellee,

-against-

HAROLD J. SMITH, WARDEN, ATTICA CORRECTIONAL FACILITY, et al.,

Respondents-Appellants.

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P/S

BRIEF FOR
PETITIONER-APPELLEE

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BRIEF FOR
PETITIONER-APPELLEE

Question Presented

Whether petitioner's admissions should have been excluded from evidence by the state court as the fruit of illegally siezed evidence.

Statement of the Case

Oscar Lee Chennault's pro se application for a writ of habeas corpus was granted by the Honorable Edward R. Neaher in a memorandum opinion and order dated October 25, 1973 (29a-42a; 366 F. Supp. 717).* Thereafter, Judge Neaher appointed present counsel to represent Chennault on motions by respondents-appellants (the "State") for a stay of the judgment and on this appeal. The State having lost motions in

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* Numbers in parentheses followed by "a" refer to pages of the appendix.

the District Court and this Court to stay the judgment below, Chennault is no longer in custody.*

The procedural history of this case is adequately set forth in the State's brief. In his opinion granting the writ, Judge Neaher relied on a somewhat more thorough and detailed version of the argument advanced by Judge Fuld and Judge Breitel in their dissent on direct appeal in the state court. People v. Chennault, 20 N.Y. 2d 518, 522, 232 N.E. 2d 324, 326, 285 N.Y.S. 2d 289, 292 (1967). The facts, which are very well stated in Judge Neaher's opinion, will be summarized here with particular emphasis on the key testimony.

Late on the morning of September 20, 1963, an employee in the office of the Montauk Freightways trucking company in Queens discovered that a bag containing a bank deposit was missing from its place on the top of a cabinet. (Tr. 37, 42).** The evidence showed that several persons had had access to the bag that morning: the four or five employees in the office, a mailman, and a minister who had visited the office seeking a contribution. (Tr. 13, 16-19, 23, 30, 41-42, 49-53).

On the afternoon of September 20, police were called to a Brooklyn hotel to investigate an attempted robbery report

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* Since Chennault was paroled one week before Judge Neaher's decision, he would not now have been incarcerated even if his application had been denied.

** Numbers following "Tr." refer to pages of the transcript of the trial, held on April 8 and 9, 1964.

which later proved groundless. (S.H. 5-7).* At the hotel, the police found Chennault in the lobby and held him for questioning. (S.H. 5-9). The police then went into the public restroom of the hotel where they found an unidentified man washing his hands and a check lying on the windowsill.** (S.H. 8, 15, 24-25). Both Chennault and the unidentified man were taken to the local police precinct. (S.H. 9, 15-16, 27). Chennault's car keys were taken from him and his car was searched. (S.H. 9-12). The search of the car turned up a valise containing clerical clothing and a photographic identification card identifying Chennault as a member of the ministry. (S.H. 12-14). At some point not clear from the record, forty-two dollars in cash was also taken from Chennault. (S.H. 35).

Late that evening, Chennault was taken to a precinct house in Queens for interrogation by Detective Greene. (S.H. 32-33). Detective Greene's desk was covered with the material that had been taken unlawfully from Chennault--the valise, the cash, and the incriminating clerical garb. (S.H. 34-36). At a pre-trial suppression hearing, Detective Greene gave this account of his interrogation. (S.H. 36-38):

> Q. For what period of time did you interrogate Chennault?

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* Numbers following "S.H." refer to pages of the transcript of a suppression hearing held April 7, 1964. It should be noted that another suppression hearing was held on January 27, 1964.

** The check was later identified as having been in the Montauk Freightways deposit bag. (Tr. 33-35, 39).

A. Maybe a half hour, 45 minutes.

Q. During the course of that interrogation, you let him know that you had $42 of his in the drawer of your desk, didn't you?

A. I didn't say the $42 was in the desk drawer.

Q. You said it was in the desk?

A. I said it was on the desk.

Q. It was in the open, on your desk?

A. Yes.

Q. And he knew that that was part of his property that was taken from him, is that right?

A. I asked him where the $42 came from.

Q. Right.

A. And he told me it was, that that is what was left from the bag of money that he took from the Montauk Freightways.

Q. Did you discuss with him the minister's collar that was in the valise?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. What did you say to him about that?

A. I asked him if he had worn that collar that day. He told me he did. I asked him if he had been to the Montauk Freightways to solicit money. He stated he was there. I asked him if he had taken a bag containing money from a cabinet or a chest in the office. He told me he did.

Q. Did you have a check made out to Cash and drawn upon the account of Montauk Freightways?

A. Yes, sir.

Q. Did you show that to the defendant as you interrogated him in the 114th?

A. Yes, sir.

Q. Did the defendant say anything to you about that?

A. Yes, sir. He told me that he kept--I asked him why he kept this check and had thrown away the other checks. He told me he had kept this check because it was made out to Cash.

Following the suppression hearing, the court ruled that the admissions with respect to the clerical garb were inadmissible but that the admissions with respect to the check could be introduced at trial. (Decision on Motion to Suppress Evidence, April 8, 1964, 4-5).

At trial, Detective Greene was permitted, over objection, to testify as follows (Tr. 66):

A. I asked the defendant where he obtained the check. He informed me that on the morning of the 20th, between 10 and 11 a.m., I believe, he was at the office of Montauk Trailways and that he solicited, to solicit money.

He told me he was refused and he saw a bank deposit bag on a cabinet there, that he took the bag with him when he left and there was checks in the bag, plus currency. He kept the currency and this one check and he destroyed the other checks.

Q. Did he state to you the manner in which he was dressed on that day?

A. Yes, sir. He told me he was dressed as a minister, with a Roman collar.

Q. Did you question him further regarding his being a minister?

A. I did ask him if he was an ordained minister. He informed me that he was but that he did not have any church or congregation.

The only other witnesses at trial were the bookkeeper and the manager of Montauk Freightways, who identified petitioner as the minister who had visited the office seeking a contribution; a partner in Montauk Freightways, who identified the check; and a patrolman, who testified that he had encountered petitioner in a lobby of a Brooklyn hotel and that he had thereafter found the check in the restroom of the hotel. (Tr. 9-11, 13, 33-35, 39-40, 95-96).

After trial, Chennault was convicted and sentenced to a term of five to ten years. On appeal, the New York Court of Appeals held that the admissions respecting the illegally seized evidence had been properly excluded but that the admissions with respect to the legally seized check introduced into evidence were admissible.* Chief Judge Fuld

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* The argument of the Court of Appeals majority proceeded from an erroneous premise as to what occurred in the trial court. The majority assumed that the decision on the pre-trial suppression hearing was adhered to--that only the admissions regarding the check, and not those regarding the clerical garb, were introduced at trial. In fact, all of petitioner's admissions, including those relating to the clerical garb, were admitted. (Tr. 66). This can be seen clearly by comparing Detective Greene's account of Chennault's confession during the April 7, 1964 suppression hearing (S.H. 36-38 quoted at pp. 3-5, supra) with the testimony Greene was permitted to give at trial (Tr. 66 quoted at pp. 5-6, supra). Both Judge Neaher and Judge Fuld recognized that the trial

and Judge Breitel, now Chief Judge, strongly dissented on the ground that petitioner's incriminating statements with respect to the check "stemmed directly from the use of the illegally seized articles". People v. Chennault, 20 N.Y. 2d 518, 524, 232 N.E. 2d 324, 327, 285 N.Y.S. 2d 289, 294 (1967).

Petitioner's petition for a writ of habeas corpus was granted by the District Court on the basis of the state court record. Petitioner, who spent approximately five years in prison on the conviction held unlawful by the District Court, was paroled a few days before the District Court granted the writ.

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court had admitted more than the Court of Appeals majority said it had; Judge Fuld characterized the trial judge's action as "egregious error". (40 a. n. 6; 366 F. Supp. 717, 720-21, n. 6; People v. Chennault, 20 N.Y. 2d 518, 523, 232 N.E. 2d 324, 327, 285 N.Y.S. 2d 289, 293 (1967)). Hence, even if the state court's reasoning as to the admissions regarding the check were accepted, one would still be left with the fact that the admissions regarding the clerical garb were unlawfully admitted into evidence.

ARGUMENT

The District Court Properly Granted The Writ

A. Oscar Chennault's Entire Confession Was the Fruit of Unlawfully Seized Evidence

This case is simpler than most that come before this court. All that is involved is the application of a settled principle of law to facts which are neither numerous nor complex. The applicable legal principle is the exclusionary rule--the rule that evidence obtained in violation of Fourth Amendment rights is inadmissible at trial. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961). The rule excludes not only the unlawfully seized evidence itself, but the "fruits" of that evidence as well. See, e.g., Wong Sun v. United States, 371 U.S. 471 (1963). The fruits of illegal searches and seizures can consist of oral admissions as well as physical evidence. See, e.g., Fahy v. Connecticut, 375 U.S. 85, 90-91 (1963). The issue presented here is whether the District Court correctly held that testimony as to petitioner's oral admissions should have been excluded as the fruit of an unlawful search and seizure.

Petitioner was questioned across a table covered with items unlawfully seized from his car and his person. (S.H. 10-14, 35-36). These items included the incriminating clerical garb and some of the cash proceeds of the robbery. (S.H. 35-36). Petitioner was first questioned about the unlawfully seized cash and clerical garb. (S.H. 36-37). In response to those questions, Detective Greene testified, petitioner admitted his guilt. (S.H. 36-37).

Only then was petitioner questioned about the check. (S.H. 37). Greene testified that petitioner told him that he had kept this particular check because it was made out to cash and had thrown away the other checks which had been in the deposit bag. (S.H. 39).

In granting the writ, Judge Neaher held that petitioner's admissions regarding the check were tainted by the illegally seized evidence:

> "Despite the fact that petitioner's admissions related to different items of evidence, it is impossible on the record to view the check admissions as resulting from an independent lawful source of information or evidence. Cf. Wong Sun v. United States, supra, at 487. The record clearly demonstrates a continuum of interrogation surrounding the clerical garb and the check. Petitioner's admissions as to the garb effectively laid the foundation for further questioning as to the check. And his admissions as to the latter can only be viewed as logically compelled by his earlier admissions. Compare United States v. Brandon, 467 F.2d 1008 (9 Cir. 1972)." (36a; 366 F. Supp. 717, 723).

Clearly, the District Court was correct in holding that petitioner's admissions with respect to the check were the fruit of unlawfully seized evidence and the prior admissions tainted by that evidence. The incriminating admissions respecting the check were made during the course of the same interrogation, after petitioner had fully incriminated himself with respect to the illegally seized cash and clerical garb. Under such circumstances petitioner's

incriminating statements respecting the check obviously were tainted as well. See Barnett v. United States, 384 F.2d 848, 861-62 (5th Cir. 1967)(admissions concerning lawfully seized evidence would be inadmissible if triggered by prior use of unlawfully seized evidence).

It is the State's burden to show that Chennault's admissions were not the fruit of the tainted evidence. See Harrison v. United States, 392 U.S. 219 (1968); United States v. Schipani, 414 F.2d 1262, 1266 (2d Cir. 1969), cert. denied, 397 U.S. 922 (1970).* In Harrison the Supreme Court held that where a defendant's incriminating testimony at trial was given in response to the Government's introduction into evidence of illegally obtained confessions, such testimony could not be used in a subsequent trial unless the Government first proved the testimony untainted:

> "* * * Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." 392 U.S. at 225. (footnote omitted).

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* The question whether the State must show freedom from taint beyond a reasonable doubt has not been clearly answered. In United States v. Schipani, 414 F.2d 1262, 1266 (2d Cir. 1969), cert. denied, 397 U.S. 922 (1970), this court stated that the "beyond a reasonable doubt" standard was applicable. However, in Lego v. Twomney, 404 U.S. 477 (1972), the Supreme Court held that a prosecutor was required only to satisfy the "preponderance of the evidence" standard to establish the voluntariness of a confession. The situations are distinguishable in that in a taint case it is already established that the prosecution has done something unlawful and arguably ought to be held to a high standard in justifying its position. Nevertheless, the court in

In view of the conceded effect of the unlawfully seized evidence on a part of petitioner's confession, the burden of showing that the remaining part of the confession is not similarly tainted is all the heavier. An influence initially powerful enough to induce a confession must be shown to have so lost its force that it (and its fruits) did not influence the making of further admissions a few minutes later.

Once the unlawful evidence has "triggered" admissions of guilt, United States v. Nikrasch, 367 F.2d 740, 744 (7th Cir. 1966), the "cat is out of the bag". See United States ex rel. B. v. Shelly, 430 F.2d 215, 218-19 (2d Cir. 1970). Having already admitted his guilt, an accused concludes that he has little to lose and "might as well answer" questions seeking further admissions. United States v. Pierce, 397 F.2d 128, 131 (4th Cir. 1968).

Although the effect of tainted admissions on the admissibility of later admissions has been litigated in a Fourth Amendment context, see Barnett v. United States, 384 F.2d 848 (5th Cir. 1967), the question has arisen more often in a Fifth Amendment context. In a number of cases, statements given following proper Miranda warnings have been suppressed as the product of admissions made prior to the giving

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Lego did cite Schipani and may have intended to disapprove it. See 404 U.S. at 479 n. 1 and accompanying text, and United States v. Cohen, 358 F. Supp. 112, 118-19 and n. 9 (S.D.N.Y. 1973).

of the warnings. See, e.g., Clewis v. Texas, 386 U.S. 707 (1967); United States ex rel. B. v. Shelly, 430 F.2d 215 (2d Cir. 1970); Gilpin v. United States, 415 F.2d 638 (5th Cir. 1969); United States v. Pierce, 397 F.2d 128 (4th Cir. 1968). See also Darwin v. Connecticut, 391 U.S. 346, 350 (1968) (Harlan, J., concurring in relevant part).

The reasoning of these cases is summarized in Gilpin, supra:

> "Here, * * * 'the cat was out of the bag'. One confession led to another. The effect of the tainted confession was not dissipated by the time of the next confession." 415 F.2d at 642.

In United States ex rel. B. v. Shelly, 430 F.2d 215 (2d Cir. 1970), the leading case in this Circuit, the effect of a prior admission on the mind of an accused who is asked additional questions is discussed at some length:

> "Whether we characterize the rationale as the 'cat-out-of-the-bag' theory or not, the simple, likely conclusion is that when a suspect, in the rapid sequence of events presented here, has already admitted his guilt, he will be far less likely to give intelligent consideration to later requests to waive his right to remain silent and to have counsel present, since he will regard them as meaningless. * * * [E]ach admission cannot be viewed without reference to what happened so shortly before." 430 F.2d at 218-19 (emphasis added).

In each of the Fifth Amendment cases cited above, a valid Miranda warning intervened between the unlawfully obtained admissions and the admissions sought to be introduced.

And in two of the cases, the admissions offered in evidence had been obtained several days after the tainted admissions were made. See Clewis v. Texas, supra; Gilpin v. Texas, supra. If a Miranda warning and the lapse of several days are not "sufficient to insulate * * * [a] statement from all that went before", Clewis v. Texas, 386 U.S. 707, 710 (1967), it is impossible to say that Chennault's admissions with respect to the check were insulated from the effect of his admissions as to the clerical garb made minutes or even seconds before.

The only thing which could possibly be regarded as a "break in the stream of events" (Clewis v. Texas, 386 U.S. 707, 710 (1967)) following the use of the clerical garb to obtain the initial admissions was the exhibition of the check to Chennault. There is no reason to suppose that Chennault would have admitted his guilt in the face of the check alone. As Chennault well knew, the check had not been connected with him in any way.*

Viewed from this perspective, the check is seen as a kind of red herring. If Detective Greene had not had the check during his interrogation, there can be little doubt

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* Although the record is sketchy and confused on the point, it appears that at the time he was taken into custody at the hotel in Brooklyn Chennault may well have been asked whether he knew about the check and could well have responded negatively. (See January 27, 1967 Suppression Hearing 17; S.H. 26-27. But see January 27, 1964 Suppression Hearing 14).

that any admissions Chennault might have made with respect to the check would have been suppressed along with his other admissions as the fruit of the unlawful seizure of the clerical garb.

No case has been found in which the artificial dissection of a confession performed by the state court here was attempted; rather, courts have recognized that there is no principle of logic or psychology confining the taint of unlawfully seized evidence to admissions relating directly to it. See, e.g., Barnett v. United States, 384 F.2d 848 (5th Cir. 1967). Indeed, confessions of totally unrelated crimes have been suppressed as the fruit of unlawfully seized evidence. See McCloud v. Bounds, 474 F.2d 968 (4th Cir. 1973). In McCloud, the police unlawfully searched the motel room of McCloud, who was a suspect in a theft from a church. During the search, the police discovered a coin collection which had been stolen from one Hill. When the police confronted McCloud with the coin collection and Hill, who identified it, McCloud confessed to the Hill burglary, the theft from the church, and other burglaries. The court held that the confession to the theft from the church was "'come at by exploitation' of the seized coins, and therefore was inadmissible", citing Fahy v. Connecticut, 375 U.S. 85, 90-91 (1963), and other cases. 474 F.2d 970.

In the present case, the admissions respecting the check were "induced" or "triggered" by the presentation of the illegally seized evidence and by the prior tainted admissions respecting the clerical garb. Although the check was legally seized, the questions concerning it were the product of the prior sequence of confrontation with evidence illegally seized and consequent admissions unlawfully obtained. The admissions as to the check were obtained in an unbroken "stream of events" and a continuum of interrogation, Clewis v. Texas, 386 U.S. 707, 710 (1967); they cannot be separated from the primary illegality. See Wong Sun v. United States, 371 U.S. 471, 488 (1963).

B. The Admission of Oscar Chennault's Un-Lawfully Obtained Confession Was Not Harmless Error

The State's alternative argument (not raised below) that the admission of Chennault's confession was harmless error is without merit. The Supreme Court has held that the beneficiary of a constitutional error must in order to sustain a conviction "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained". Chapman v. California, 386 U.S. 18, 24 (1967). This test, the Court has said, is intended to carry forward the substance of the standard formulated in Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963):

> "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

See Chapman v. California, 386 U.S. 18, 23-24 (1967).

In the present case it is clear both from the nature of the other evidence against Chennault and from the force of the evidence unlawfully admitted that the error was not harmless.

Absent the unconstitutionally obtained evidence, the case against Chennault was very thin. The office manager and the bookkeeper of Montauk Freightways each identified Chennault as the minister who had sought a contribution on the morning that the bank deposit bag was discovered missing. (Tr. 9-11, 13, 39-40). This evidence tended to prove only that Chennault had had an opportunity to take the bag. The record also showed that there were several other persons who had a similar opportunity. A mailman had come to the office at about the same time as Chennault and had been in the vicinity of the deposit bag. (Tr. 13, 19, 23, 30, 41-42, 53). Any of the employees in the Montauk Freightways office could also have taken it. The office manager, the bookkeeper, and two or three other employees worked near the cabinet on which the deposit bag lay. (Tr. 16-18, 49-52). The only other evidence which could be said even remotely to link Chennault with the crime was the testimony

of a patrolman that a short time after he found Chennault in the lobby of a Brooklyn hotel he found a check in the public restroom of the hotel.* (Tr. 95-96). There was no testimony that Chennault had ever been in the restroom or was otherwise responsible for the check being there. (Cf. Transcript of January 27, 1964 Suppression Hearing 15-16).

This is not a case in which the confession was a redundant addition to an overwhelming body of incontrovertible evidence. Rather, the unlawfully seized evidence provided proof of a key element--that Chennault actually took the deposit bag. If this element--that Chennault actually took the bag--was inferable at all from the evidence apart from the confession, it was only by a series of attenuated inferences. Confronted only with that evidence, "honest, fair-minded jurors might well have brought in not-guilty verdicts". Chapman v. California, 386 U.S. 18, 26 (1967).

Furthermore, the unlawfully admitted evidence was evidence of unique significance--a confession. A confession is evidence of a particularly impressive kind, having an impact far beyond that of ordinary items of evidence. The Supreme Court of California has said that

"the confession operates as a kind

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* The check was later identified as part of the Montauk Freightways deposit. (Tr. 33-35, 39).

> of evidentiary bombshell which shatters the defense." People v. Schader, 62 Cal. 2d 716, 401 P. 2d 665, 674, 44 Cal. Rptr. 193 (1965).

No one could say beyond a reasonable doubt that Chennault's confession did not influence the jury's verdict; indeed, common experience suggests that it was the principal evidence relied upon by the jury. Far from being harmless, the admission of the unlawfully obtained confession was particularly damaging.

CONCLUSION

The District Court decided this case correctly. The judgment appealed from should be affirmed.

Dated: New York, New York
April 18, 1974

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